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No. 04-563

IN THE SUPREME COURT OF THE UNITED STATES

DENEICE A. MAYLE, Warden, *Petitioner,*

v.

JACOBY LEE FELIX, *Respondent.*

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR PETITIONER

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IN THE SUPREME COURT OF THE UNITED STATES

No. 04-563

DENEICE A. MAYLE, *Petitioner,*

v.

JACOBY LEE FELIX, *Respondent.*

I.

THE NINTH CIRCUIT ACKNOWLEDGED THERE IS A SPLIT OF AUTHORITY AMONG THE CIRCUITS

Respondent cannot dispute the clear split of authority among circuits regarding the proper application of Federal Rule of Civil Procedure 15(c)(2) to habeas proceedings. Contrary to Respondent's view, the Ninth Circuit's analysis reflects that its definition of "conduct, transaction or occurrence" was not governed by the specific facts in this case, and that its holding was meant to have broader application.[1/]

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1. Two recent unpublished decisions by the Ninth Circuit have applied the holding in this case in other circumstances. *See Dykes v. Lampert*, 2004 WL 2370555 (9th Cir. (Or.) Oct. 21, 2004) (due process claim based on court's ruling to admit hearsay testimony related back to petition that alleged ineffective assistance of counsel and a due process claim that trial transcripts were significantly altered); *Earl X v. Morrow*, 2004 WL 1941268 (9th Cir. (Or.) Aug. 30, 2004) (new claim that state failed to disclose that petitioner had served as informant against the victim relates back to original petition that alleged claims of ineffective assistance of

Respondent attempts to factually distinguish this case from those of other circuits that have more narrowly interpreted "conduct, transaction or occurrence" by noting that his coerced confession claim and his Confrontation Clause claim both stemmed from the same discrete point in litigation (his trial) and from the actions of the same actor (the trial judge). (Opp. 5-6.) He makes artificial distinctions that have never been acknowledged, let alone adopted, by any court that has applied Rule 15(c)(2) to habeas proceedings. And Respondent fails to distinguish each opposing case. (See Opp. 6, n.5.)

In *Davenport v. United States*, 217 F.3d 1341 (11th Cir. 2000), the Eleventh Circuit, guided by cases from the Third, Fourth and Eighth Circuits, found that new claims of ineffective assistance of counsel at the sentencing stage did not relate back to the original habeas motion, which had also alleged ineffective assistance of counsel at sentencing.[2] *Id.* at 1343, 1346. In *United States v. Pittman*, 209 F.3d 314 (4th Cir. 2000), the Fourth Circuit found that a new claim challenging an enhancement for obstruction of justice for failure to appear at sentencing did not relate back to the initial habeas motion, which included an allegation that the enhancement for a prior conviction was improper. *Id.* at 317-18. Thus, other circuits have denied relation-back under factual situations analogous to this case–i.e., where the claims stem from the same point in litigation and from the actions of the same actor.

More importantly, the Ninth Circuit recognized that there is no relevant distinction between the facts in this case and those of other circuits that would have allowed its holding to be reconciled. In addressing the opposing case authority, the Ninth Circuit stated, "we cannot distinguish these cases, and so we

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counsel).

2. That the inmate in *Davenport* needed leave of the court to file an amended motion is irrelevant. The case focused on the application of Rule 15(c)(2). *Davenport*, at 1343-46. Federal Rule of Civil Procedure 15(a) was not even mentioned.

reject their rule in favor of that of [*Ellzey v. United States*, 324 F.3d 521 (7th Cir. 2003)]." (App. A8.)

Respondent also attacks the scope of the question presented by stressing that this case involved claims that arose out of his trial, not his sentence. (Opp. 6-7.) However, the Ninth Circuit had embraced *Ellzey*, a case that did not restrict "conduct, transaction or occurrence" to the trial and conviction. (App. A4.) In *Ellzey*, the Seventh Circuit decided whether added arguments based on *Apprendi v. New Jersey*, 530 U.S. 466 (2000), relate back to a timely-filed habeas motion based on ineffective assistance of counsel at sentencing. *Ellzey*, 324 F.3d at 525. The *Ellzey* court concluded that "[a] prisoner who comes up with ten different ways to contest his sentence still is litigating about a single transaction or occurrence (the supposedly unlawful sentence), so an amendment necessarily relates back under Rule 15(c)(2)." *Id.* at 526. In addition, the Ninth Circuit had stated its disagreement with cases that hold that "the untimely claim must have more in common with the timely filed claim than the mere fact that they arose out of the same trial and sentencing proceedings." *See Davenport*, 217 F.3d at 1344. Thus, the dissent expressed a reasonable understanding that the holding in this case provides that "any claim stemming from pre-trial motions, the trial, or sentencing relates back to a timely-filed habeas petition . . . ." (App. A13.) Certainly, if the Ninth Circuit did not mean or want its decision to be so construed, it would have responded accordingly.

In any event, Respondent cannot dispute that there is a clearly established split of authority regarding whether "conduct, transaction or occurrence" means the inmate's "state trial and conviction." (App. A4, A7-A8.)

II.

THE ISSUE OF WHETHER RULE 15(C)(2) SHOULD BE APPLIED IN A MANNER THAT ERODES THE EFFECTIVENESS OF THE STATUTE OF LIMITATIONS UNDER THE ANTITERRORISM AND EFFECTIVE DEATH PENALTY ACT OF 1996 ("AEDPA") IS OF GREAT IMPORTANCE AND WARRANTS REVIEW BY THE COURT

The dissent opined that the decision "obliterates AEDPA's one year statute of limitations." (App. A13.) Nonetheless, Respondent asserts that the question presented is not important because the relation-back issue simply does not arise that often. (Opp. 7-8.) Not so.

The filing of a habeas petition by counsel is not rare; in fact, habeas petitions in capital cases are generally filed by counsel.[3/] Thus, the filing of an amendment to add new claims following expiration of the statute of limitations, especially in capital cases, can be expected in the Seventh and Ninth Circuits, where Rule 15(c)(2) has been so broadly interpreted. This case may also encourage amendments in other Circuits as well.

That the Ninth Circuit only recently sought to define "conduct, transaction or occurrence" does not indicate that the question presented is raised infrequently. Instead, it only reflects that the Ninth Circuit was able to previously resolve relation-back issues without having to determine the full scope of Rule 15(c)(2)'s application. (See App. A8, citing *Anthony v. Cambra*, 236 F.3d 568, 576-77 (9th Cir. 2000).) In any event, the number of cases from the various circuits regarding the proper application of Rule 15(c)(2) to habeas proceedings belies the notion that the relation-back issue rarely arises. (Pet. 7-8.)

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3. And the law does not limit a pro per inmate's ability to amend his petition any more than that of a represented inmate should he chose to do so.

Since this case was decided, there have been three published cases that applied Rule 15(c)(2) in the habeas context–i.e., *Ryan v. Clarke*, 387 F.3d 785, 789 (8th Cir., Oct. 29, 2004); *Bender v. United States*, 2004 WL 2011449, *4-8 (D.Me., Sept. 9, 2004); *Zabrinas v. McKune*, 2004 WL 2011454 (D.Kan., Aug. 30, 2004).[4/] Obviously, the issue regarding the proper application of Rule 15(c)(2) to habeas proceedings is an ongoing concern.

In addition, the existence of factors, other than the statute of limitations, that could prevent the filing of an amendment does not diminish the importance of the question presented. Regardless of whether these other factors would effectively preclude amendment, the Ninth Circuit decision still allows the district court to grant leave to habeas petitioners to add new (and even exhausted) claims to their petitions, without adequate notice and after expiration of the statute of limitations.[5/] (Pet. 15.)

Respondent also asserts that this Court should not review this case because the Ninth Circuit decision is interlocutory. (Opp. 8-9.) This Court frequently grants certiorari before resolution of the case on the merits when the statute of limitations is involved. *E.g.*, *Carey v. Saffold*, 536 U.S. 214, 218 (2002); *Duncan v. Walker*, 533 U.S. 167, 171 (2001); *Artuz v. Bennett*, 531 U.S. 4, 6 (2000).

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4. Also, there have been two unpublished decisions from the Ninth Circuit. *Dykes v. Lampert*, 2004 WL 2370555; *Earl X v. Morrow*, 2004 WL 1941268. And of course, there may be any number of district court decisions addressing the relation-back issue that have not yet reached that circuit.

5. And leave of court is not even required when a responsive pleading has not yet been filed. Fed. R. Civ. P. 15(a).

III.

RESPONDENT'S ARGUMENTS ON THE MERITS MERELY SERVE TO AFFIRM THAT THE CIRCUIT COURTS DISAGREE OVER THE PROPER APPLICATION OF RULE 15(C)(2)

The majority of circuits that have addressed the applicability of Rule 15(c)(2) to habeas proceedings have found that new claims do not relate back simply because they arose out of the same trial, conviction or sentence that was challenged in a timely file petition. (Pet. 7-9.) Some circuits have found that a broad interpretation of "conduct, transaction or occurrence" to allow for such relation back of claims would undermine the limitations period set by Congress in the AEDPA. (Pet. 11.) Others have stressed that too broad an interpretation of "conduct, transaction or occurrence" fails to provide adequate notice. (Pet. 14.)

Respondent argues that *Ellzey's* analysis demonstrates that the other circuits have misconstrued how Rule 15(c) operates in civil practice. As the dissent in this case observed, *Ellzey* does not offer "a convincing reason to deviate from 'the central policy of Rule 15(c)–ensuring that the nonmoving party has sufficient notice of the facts and claims giving rise to the proposed amendment.'" (App. A17.) In addition, *Ellzey* does not account for Rule 11 of the Rules Governing Section 2254 (and the Committee Notes thereto), which reflects that Rule 15(c) should not be rigidly applied in a manner that would be inconsistent in the overall framework of habeas corpus–i.e., in a manner that is incompatible with the intent behind the AEDPA. (Pet. 12-13.)

Contrary to Respondent's view, this Court's decision in *Tiller v. Atlantic Coast Line R. Co.*, 323 U.S. 574 (1945) does not demonstrate that *Ellzey* and this case properly applied Rule 15(c)(2). *Tiller* was not a habeas corpus case and was decided well before enactment of the AEDPA. That case did not raise

the question presented herein and really has no bearing on it. Respondent can hardly claim that *Tiller* stands for the proposition that Rule 15(c) applies to habeas corpus proceedings in the exact manner as general civil cases when AEDPA's statue of limitations did not exist at the time, and when this Court has never ruled that Rule 15(c) applies to habeas proceedings. (Pet. 6, n.3.)

CONCLUSION

For the foregoing reasons, and those stated in the petition, the petition for writ of certiorari should be granted.

Dated: December 2, 2004

Respectfully submitted,

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